United States Court of Appeals

For the Second Circuit

Docket No. 24118

GEORGE P. GWINETT,
Plaintiff-Appellant,

against

ALBATROSS S.S. CO., INC.,
Defendant,

and

ASTRA STEAMSHIP CORPORATION,
Defendant-Appellee.

APPENDIX TO APPELLANT'S BRIEF

On Appeal from the United States District Court for the Southern District of New York

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Pertinent Docket Entries

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Date	*Item*
Nov. 13, 1951	Complaint filed summons issued.
Nov. 21, 1951	Return on summons filed.
June 30, 1953	Answer filed.
April 16, 1956	Before Dawson, J. Trial begun dismissed as to Albatross S.S. Co.
April 17, 1956	Trial continued.
April 18, 1956	Trial continued and concluded. Verdict for defendant.
April 19, 1956	Filed judgment that defendant Astra Steamship Corp. have judgment against plaintiff. Mailed notice of entry 4/20/56.
April 19, 1956	Filed plaintiff's notice of appeal and mailed copy to Haight, Deming, Gardner, Poor and Havens.

Complaint

(Record pages 330 to 333)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. No. 71-48

GEORGE P. GWINETT,

Plaintiff,

against

ALBATROSS S.S. CO., INC., and ASTRA STEAMSHIP CORPORATION,

Defendants.

Plaintiff demands trial by jury on the issues herein.

Action under special rule for seamen to sue without security or prepayment of fees for the enforcement of the common and statutory law of the United States for the protection of the health and safety of seamen.

Plaintiff, by his attorney, Harry D. Graham, complaining of the defendant, alleges:

FOR A FIRST CAUSE OF ACTION

First: Upon information and belief, that at all of the times hereinafter mentioned the defendants were, and still

are, domestic corporations organized and existing under and by virtue of the laws of the State of New York maintaining their offices and place of business at 120 Wall Street, in the City of New York and within the jurisdiction of this honorable court.

Second: That at all of the times hereinafter mentioned, the defendant Alcatross S.S. Co., Inc., was, and still is, the duly registered owner of a certain American merchant vessel known as the "Harold T. Andrews".

Third: Upon information and belief, that at all of the times hereinafter mentioned the defendants, and each of them, managed, operated and controlled the said steamship "Harold T. Andrews".

Fourth: That at all of the times hereinafter mentioned, the plaintiff was in the employ of the defendants as a regular merchant seaman on board said vessel in the capacity of Third Assistant Engineer at a base rate of pay of $378.66 per month, with overtime at the rate of $1.85 per hour, together with area bonus and found.

Fifth: That on the 4th day of July, 1951, while said vessel was upon the high seas, plaintiff, under orders and while exercising due care and caution, was suddenly and without notice caused to sustain serious and severe personal injuries while lifting and handling a cylinder head of a generator in the engine-room of said vessel.

Sixth: That the aforesaid injuries were not due to any fault or want of care upon the part of the plaintiff, but were due wholly and solely to the unseaworthiness of the vessel and the negligence of the defendants in failing to provide the plaintiff with a safe place in which to work; in failing to provide plaintiff with adequate and sufficient

help to safely carry out the task assigned to him and which he was then performing; in failing to provide him with adequate and proper tools and appliances to safely carry out said task; in failing to promulgate and enforce proper and safe rules for the conduct of said task and in requiring plaintiff to labor under conditions known to the defendants, and those for whom they are responsible, to be dangerous and hazardous to the health and safety of the plaintiff, all in violation of the Seamen's Act of 1920, commonly known as the Jones Act, 46 U. S. Code 688, and the general maritime law.

Seventh: That by reason of the aforesaid injuries, plaintiff became sick, sore, lame and disabled, has been and will be prevented from working; has lost, and will have to lose, large sums of money that he otherwise would have earned; has required, and will require, hospitalization and surgical and orthopedic treatment; has suffered, and will have to suffer, great pain and agony, all to his damage in the sum of One Hundred Thousand Dollars ($100,000.00) and has been permanently injured.

FOR A SECOND CAUSE OF ACTION

Eighth: Plaintiff, by his attorney, repeats and realleges each of the foregoing allegations with the same force and effect as though more fully set forth herein, and in addition thereto alleges:

Ninth: Upon plaintiff becoming ill as aforesaid, it was the duty of the defendants and those for whom they are responsible to provide plaintiff with reasonably prompt and proper medical care and treatment.

Tenth: That on or about the 8th day of July, 1951 plaintiff discovered, to the knowledge of the defendants and those for whom they are responsible, that he could not get out of his bunk without assistance because of the intense pain with which he was suffering.

Eleventh: That although the aforesaid vessel reached the port of Bristol (Avonmouth), England on or about the 13th day of July, 1951, the defendants, and those for whom they are responsible, failed and neglected to provide the plaintiff with any medical care or attention until on or about the 25th day of July, 1951, when he was finally sent to the Bristol Royal Infirmary at Bristol, England, where his condition was diagnosed as a ruptured or dislocated I.V. disc, which diagnosis was transmitted to the defendants and plaintiff's upper body was placed within a plaster cast.

Twelfth: That though duly demanded, defendants refused to discharge the plaintiff from said vessel and his articles of agreement at Bristol, but instead, compelled the plaintiff to sail with said vessel and, despite his condition, required him to perform the duties of Third Assistant Engineer until the vessel reached Churchill, Canada, where he was discharged from said vessel on or about the 13th day of August, 1951.

Thirteenth: That by reason of the aforesaid dereliction of duty by the defendants, and those for whom they are responsible, the plaintiff was caused to unnecessarily sustain further pain and suffering and aggravation of his injuries, which are believed to be permanent, all to his damage in the sum of Seventy-five Thousand Dollars.

Wherefore, plaintiff demands judgment of the defendants in the sum of $100,000.00 upon the First Cause of Action and in the sum of $75,000.00 upon the Second Cause of Action, together with the costs and disbursements of this action.

New York, N. Y.,
November 13th, 1951.

HARRY D. GRAHAM,
Attorney for Plaintiff.

Charge of the Court

(Record pages 291 to 326)

(Dawson, J.)

The Court: Ladies and gentlemen of the jury:

We have now reached the point in this trial where you are about to enter upon your final functions as jurors, which, of course, is one of the sacred duties of citizenship. You have given careful attention to the evidence during the trial, and I am sure you will conduct your final deliberations in the same fine spirit and reach a verdict with fairness and impartiality.

In our court system, the functions of the judge and the functions of the jury are clearly defined. As you are not lawyers, it is my duty to instruct you as to what the law is. It is your duty to accept the law as I state it to you, and then to determine from the facts—from the evidence—whether the plaintiff has sustained his burden of proof in the cause of action which he has presented.

Just as I am the exclusive judge of the law, so you, the members of the jury, are the exclusive judges of the facts. As the sole and exclusive judges of the facts, you and you alone determine the weight, the effect, the value of the evidence and the credibility of the witnesses; and on that basis you will determine the issues of fact which I will submit to you.

This action was brought by the plaintiff, George P. Gwinett, against the Albatross Steamship Company, Inc. and Astra Steamship Corporation. The action has been dismissed against Albatross Steamship Company, and this leaves as the defendant the Astra Steamship Corporation, which was the company that owned the ship.

Plaintiff is seeking damages against this defendant on the ground, as alleged by the plaintiff, that the defendant failed in a duty which the plaintiff says it owed him, and

that as a result of the defendant's failure to perform this duty, the plaintiff says he suffered certain injuries.

The first question which you will have to decide is whether the defendant steamship company is liable for the injuries of which the plaintiff complains.

Therefore, I must instruct you as to what the law is as to the duties of an employer of seamen, and you must follow this instruction in your determination of the issue of liability in this case.

Under the laws of the United States, any seaman who suffers personal injuries in the course of his employment may maintain an action for damages, but in order to recover damages it is necessary for him to establish either that the disability was the result of the negligence of the shipowner, or was the result of the ship being unseaworthy.

No claim was made in this case that the ship was unseaworthy. The only claim is that the injuries were the result of the negligence of the shipowner.

Now I would point out to you that the mere fact that a man is injured while working on a ship does not in and of itself entitle the plaintiff to a recovery in an action. The law is not a workman's compensation act. The law provides in other ways which are not here in dispute for the maintenance and medical care of a man during a period of disability incurred while working on a ship, and there has been no claim made in this case that the plaintiff has not received such maintenance or that he has had to expend anything for medical care.

This suit, this action for damages, involves purely a question as to whether the injuries which the plaintiff received were due to the negligence of the defendant. That is the first issue that you will have to decide.

The fact that an accident happened to plaintiff does not in and of itself mean that the plaintiff is entitled to recover. Accidents sometimes happen without anybody being negligent.

Charge of the Court

Plaintiff alleges that the defendant shipowner was negligent in three respects:

(1) that it did not provide him with reasonably sufficient assistance to replace the top of the generator;

(2) that it did not provide him promptly with medical care, and

(3) that it had him work on the return voyage and thereby aggravated the injuries.

There are certain facts which are not in dispute in the case. There is no dispute that the defendant worked as the third assistant engineer on the Steamship Harold T. Andrews, which is owned by the defendant steamship company.

There is no dispute that while on a voyage of the ship from Baltimore to England, in the early part of July, 1951, plaintiff, in the course of his duties of overhauling a generator, removed the cylinder head from the generator and did certain work on the generator to overhaul it.

Plaintiff says that on July 4, 1951, the chief engineer told him to finish the job on the generator, which would have required putting back the cylinder head on the generator.

There was varying testimony as to the weight of the cylinder head. The plaintiff estimated that it weighed 50 pounds or more. The chief engineer in his deposition stated that it weighed about 25 pounds.

The plaintiff testified that the cylinder head was a piece of steel approximately 14 inches long, and that to replace it at the top of the generator he would finally have had to lift it to a position a little bit above his head.

He stated that he asked the chief engineer to assign a wiper to assist him, but that the chief engineer told him that he would not assign a wiper since this was a holiday and since this would require overtime.

This was disputed in the deposition of the chief engineer.

The plaintiff testified that in order to get this top back on the generator he first lifted this piece of steel about three feet, to about his knees or a little higher—maybe his waist—and put it on top of the generator before preparing to move it to a higher position, where it would be on top of the cylinder.

Plaintiff states that as he lifted this piece of steel this distance of about three feet, he felt a pain in his back and that he could not continue the work, and did not continue to work that day, but that later on, on following days, he completed the work.

Now, the position of the plaintiff on the first cause of action is that in directing him to replace this head on the generator, and in not providing him the assistance of a wiper, the shipowner—acting through the chief engineer—was negligent and that it was responsible for the injuries which the plaintiff says he suffered.

The defendant, on the other hand, takes the position that the plaintiff was a strong, able man about forty years of age, and that there was nothing negligent on the part of the shipowner in suggesting that he complete the work on the generator, that there was no reason for a chief engineer to believe that lifting this piece of steel a few feet would cause injury to the back of a ship's officer, such as the plaintiff.

Defendant further contends that any injury which plaintiff suffered to his back was not caused by lifting the steel but was, as one of the doctors testified, the result of a pre-existing degeneration of the disc between the vertebrae, and that this merely accentuated something which already existed, and that the result was exactly the same as might happen to any person with that condition from lifting an ordinary object, and as has been suggested, from such a simple act as driving a car, tying a shoe lace or bending over in bed.

The defendant's duty to plaintiff was to exercise reasonable care as to any dangers which might be apprehended. In other words, the defendant, the shipowner, through its officers, was under a duty to use reasonable care for the safety of the plaintiff. A breach of that duty would constitute negligence.

If defendant directed plaintiff to do a job which a reasonable man would consider as dangerous to the plaintiff, then of course defendant would be guilty of negligence.

If, on the other hand, defendant directed the plaintiff to do a job which was a customary job, and which was not the type of thing which reasonably would be expected to cause injury to the plaintiff, then the mere fact that an injury did occur is no proof in and of itself that the injury was caused by the negligence of the defendant.

The defendant is under a duty to see that a man is not compelled to work without necessary assistance, if work without assistance would be dangerous to him. It is not required to provide assistance if the work without assistance would not be such that a reasonable man would say needed assistance to prevent injury.

Therefore, the first question which you will have to decide in this case is this: Was it negligence on the part of the chief engineer to direct the plaintiff to complete the work on the generator, if he did direct him to do so, without providing the assistance of a wiper to help him?

On this you may take into account the fact that plaintiff was acquainted with the weight of the object which he lifted, that he lifted it about three feet, that the chief engineer denied that the plaintiff had asked for assistance on the job, but, on the other hand, that the second assistant engineer testified that he heard the plaintiff ask for assistance of a wiper, and that the chief engineer refused to assign a wiper. You may use your own common sense in determining whether a reasonably prudent man in the position of the chief engineer or the officers of the ship would con-

clude that it was a dangerous thing to order or permit a forty-year-old ship's officer to complete the repair of a generator which involved the lifting of a piece of steel of the weight which has been described by the witness, and order or permit him to do it without the assistance of another man. Was that such that a reasonably prudent man would consider that that was a dangerous thing to do, and therefore negligence?

If you find that the plaintiff has not established by a fair preponderance of the evidence that the defendant was negligent in having plaintiff do this job or in not providing him with a wiper to assist him in the job, then of course you would have to return a verdict for the defendant.

If, on the other hand, you find that the plaintiff has established by a fair preponderance of the evidence that the acts of the chief engineer were negligent acts, then you may decide this issue of liability in favor of the plaintiff. But not until you decide the issue of liabilty should you consider the question of damages.

Plaintiff's second cause of action alleges that defendant failed to provide plaintiff with any medical care or attention until July 25, 1951, and that they compelled the plaintiff to sail with the vessel and to perform his duties as third assistant engineer until the vessel reached Churchill, Canada, and plaintiff alleges that by reason of these facts he was caused to unnecessarily sustain further pain and suffering and aggravation of his injuries.

Now, the law is that when a seaman becomes ill or injured while in the service of a ship, whether it is due to the negligence of the ship or not that the injuries occurred, it is the duty of the shipowner to procure reasonably prompt, proper and adequate medical care and attention.

The plaintiff contends that from the time of the arrival of the ship in England on July 13, 1951, he was not permitted to go to a doctor until July 25, 1951, although he

says that he had in the interval asked for permission to go ashore to a doctor.

Defendant, on the other hand, contends that the plaintiff himself agreed without protest to remain on the ship until the first assistant engineer returned from Scotland.

The defendant also presented testimony from the log that plaintiff went off the ship on July 20, 1951, to go to a doctor, but, according to the entry in the log, returned in an intoxicated condition.

Plaintiff admitted on cross-examination—that was in the evidence that was read—that he was off the ship several times between its arrival and July 25th, and could have gone to a doctor on those occasions, but that he did not go.

Here again you have a question of fact as to whether a failure to receive medical care was due to the negligence or improper conduct of the ship's officers, or whether it was due to the plaintiff's own inaction and failure to go to a doctor.

If you believe the plaintiff has established by a fair preponderance of the evidence that he was prevented from going to a doctor for the period of time alleged, and that thereby his injuries were aggravated, you may on the second cause of action find a verdict for the plaintiff.

On the other hand, if you find that the failure of the plaintiff to go to a doctor was due to his own inaction and not due to any negligence or wrongful act on the part of the ship's officers, then on this second cause of action, as far as this matter is concerned, you will find a verdict for the defendant.

In the second cause of action plaintiff also contends that his injuries were aggravated because, says the plaintiff, he was compelled to sail with the ship and required to perform the duties of third assistant engineer until the ship reached Churchill, Canada. The plaintiff states that the captain refused to discharge him in England.

The defendant, on the other hand, contends that the plaintiff himself wished to remain on the ship on the return voyage and that he was given light duty, and that since his body was in a plaster cast, he would not have done any bending or stooping of a type, during that return voyage, which could have aggravated his injuries.

Here, again, you have a question of fact as to whether the plaintiff was compelled to remain on the ship and compelled to do work which would aggravate his injuries, or whether, as a matter of fact, he himself preferred to return with the ship, and whether, in fact, the work which he did was light work which would not aggravate his injuries.

After you have decided these issues of fact, you will have to decide the question as to whether there was any liability on the part of the defendant due to the negligence or failure to provide medical care or requiring him to work on the ship on the return voyage.

If you find the plaintiff has not proved these issues by a fair preponderance of the evidence, you should return a verdict for the defendant.

If you find that the plaintiff has established the liability of the ship on these issues, or any of them, by a fair preponderance of the evidence, then you may turn to the question of what damages should be allowed to the plaintiff.

In other words, you are not to consider damages to the plaintiff unless you have first determined as a matter of fact that the balance of proof weighs in favor of the plaintiff, and that therefore the defendant is liable.

Damages are not to be awarded in the absence of a determination of liability.

If you find the plaintiff was careless of his own safety and that the injuries were caused solely by his own negligence, then of course the plaintiff cannot recover because the only negligence then would have been the negligence of the plaintiff.

If, however, you find that the defendant, through the shipowners or officers, were negligent and that the plaintiff at the same time failed to exercise that degree of care that a seaman of his experience would have used in similar circumstances, then you would find that the plaintiff was guilty of contributory negligence, and in that case it would be your duty to diminish the damages which plaintiff otherwise would get in proportion to the amount of negligence attributable to the plaintiff himself.

If you find that the defendant is liable, then, in determining damages in a case such as this, the law, as in all cases, attempts in so far as possible to award a just and fair compensation for the loss which flows from the wrong done to the plaintiff.

The damages awarded in such case would have to be purely compensatory; neither inadequate nor excessive.

Punitive damages against an employer may not, in a case such as this, be granted.

If you determine that damages should be awarded, the damages should include such sums as you will find will compensate the plaintiff for the following:

(1) Pain and suffering in the past and up to the present resulting from this injury. Also such pain and suffering as you believe from the evidence he is likely to experience in the future as the direct result of this injury.

(2) Any loss of earnings to the plaintiff or loss of future earnings. If the plaintiff's injuries are permanent and his future earnings will thereby be affected, you must consider his age, his physical condition, his life expectancy, the type of employment before the injuries and the type of employment he may be able to engage in from now on.

Plaintiff, as a seaman, has been entitled to free medical attention and hospital care at a United States Public Health Hospital. He has not shown that he has expended any money for doctors or hospital care. Therefore, no part

of any verdict should take into consideration any expense for such hospital or medical care.

As I said, you may take into account any loss of future earnings resulting from any permanent injuries if you find the defendant liable.

Plaintiff maintains that he is unable to secure as good a position as he would have had before he had the trouble with his back. On that you have his testimony of what he did before the injuries and what he has done since.

The testimony showed that his hospital and medical care ended in February, 1952, and on February 18, 1952, he took on the job of third assistant engineer on the Steamship Oregonian, and he was on that job for nine months.

The testimony showed that his basic rate of pay on that ship, after the accident, was $413, whereas his basic rate of pay on the Harold T. Andrews at the time of the accident was $378.66 a month. However, plaintiff has pointed out that there have been raises in pay in the interval.

When I talk about "basic pay," of course you understand that there is always overtime and bonuses and things like that that may be added to that basic rate of pay.

The testimony shows that on March 3, 1954, plaintiff got a job as junior engineer on the Steamship African Star and worked at that position for approximately eighteen months, or until approximately November of last year, at which time apparently he got some broken ribs.

He got a basic rate of pay on that job of $435 a month.

Plaintiff states that the basic rate of pay of a third assistant junior engineer is now $488 a month.

There was testimony, as you will remember, that a job as junior engineer on the Steamship African Star involved the same kind of work as a third assistant engineer would do, so far as manual labor was concerned. Therefore, you will have the question as to whether there has been any

permanent diminution in plaintiff's earnings, and, if so, how much should be awarded for such diminution, if you find the defendant liable.

If you think there is any diminution of earnings, then you will award for such item such amount as in your sound judgment would be the present cash value of this loss of earnings, taking into account plaintiff's life expectancy, his likelihood of retirement at a given age, the type of compensation which he reasonably may be expected to receive as contrasted with the earnings which he might reasonably have expected to receive had the injury not occurred.

Obviously any amount to be awarded for pain and suffering and the nature of the injury cannot be determined by anybody with mathematical precision. However, if you find the defendant liable, any amount which you would award for pain and suffering and injury would have to be based on fact, not merely conjecture or bare possibility of belief. It is a matter which rests in your sound discretion. All of you have been drawn from different walks of life and have had different experiences. You will be guided by your own common sense, experience and judgment in this matter.

Now, I have said that the plaintiff must establish his case by a fair preponderance of the evidence. He is the one who brought this suit, therefore he has the burden of proof, and the fair preponderance of the evidence is not a mystical or abstract term. It is no more than the greater weight of the evidence, and this weight is determined by the quality rather than the quantity of the evidence. It has nothing to do with the number of witnesses called to testify on behalf of either party. The burden of proving the case by the greater weight of credible evidence rests on the plaintiff.

You may say that a fact is proved by a fair preponderance of the evidence when all the evidence which you believe tends to persuade you of what the witness or wit-

nesses have said on that fact as against the other testimony that has come into the case.

If you find that the testimony on the issues of liability and on the issues of damages, when weighed, balances in favor of the plaintiff, then he is entitled to recover.

If, however, you find that the evidence weighs equally in favor of the plaintiff and the defendant, then plaintiff would have failed in his burden of proving the defendant liable by a fair preponderance of the evidence.

Obviously, if you find that the weight of evidence is in favor of the defendant, then your verdict would be for the defendant.

In your search for the truth, which is what you are searching for in this case, you must use your plain, everyday common sense. You must not be governed by sympathy. Your actions and responses to the evidence should be no different because you are sitting as members of the jury than your responses and actions would be in your business life or in your home life. Your common sense goes with you right into the jury room as it goes with you in all other phases of your life.

You have seen the witnesses on the stand and observed their manner of giving testimony. How did the witness impress you? Was his story reasonable? Was it believable? Did the witness appear to be testifying frankly, candidly and fairly?

In determining what degree of credit you should give a witness' testimony you may consider his conduct, his manner of testifying, the reasonableness of the story which he tells, and also his interest in the outcome of the controversy.

In other words, in evaluating the testimony and credibility of witnesses, you apply your common sense and experience precisely as you would in determining an important matter or affair in your own life, if you are attempting

to ascertain whether you have a true picture of a given situation so as to make a determination one way or the other.

What I have said here applies to all witnesses. You may take into account the interest of a witness.

The plaintiff, of course, is an interested witness. Employees of the defendant are interested witnesses. You may consider that in determining the weight and credibility to be given to an interested witness. However, this does not mean that because a person is interested in the result that he is not capable of telling a truthful version of an occurrence.

If you believe that any witness wilfully testified falsely to any material fact, you may disregard all of his testimony, or, on the other hand, you may accept such of his testimony as you believe is worthy of credence. What you accept, what you believe, is up to you.

You have heard the witness. You have a right to see the exhibits. It is up to you to judge the testimony of the witnesses and the exhibits fairly, impartially, without prejudice and without sympathy, just as you would expect it to be judged if you were a party to a lawsuit either as a plaintiff or as a defendant.

You are not to assume that I have any views other than I have indicated in my instructions to you with respect to the law applicable to the case. I have reviewed some of the evidence in the charge. Obviously I could not review it all. But you have heard it and you are to draw your conclusions from all of the evidence which you have heard.

If in the course of these instructions I made reference to any evidence which does not accord with your recollection, you are to disregard such statement by me. It is your recollection of the evidence and not the statements of the Court or counsel which governs you in your determination of the facts of the case.

Charge of the Court

The actions of the Court during the trial in ruling on motions or overruling objections or in setting forth the law in these instructions are not to be taken by you as any indication of the determination of issues of fact by me. These are matters of procedure with which the jury has no concern. You are the ones who determine the facts.

There are twelve men and women on this jury. Any verdict must be the unanimous verdict of all of you. A ten-to-two verdict or nine-to-three verdict is not a good verdict in the federal court. However, I would point out that no one should enter upon the deliberations in the jury room with such pride of opinion that he or she would refuse to change it if convinced by intelligent argument and discussion on the part of another juror or jurors that they are right. That is the purpose of a discussion. Discuss the thing with an open mind and try to reach an honest conclusion. You seek for light and not for heat in the discussion.

You do not do violence to your own well-founded opinion. You are entitled to that opinion. In other words, each one of you must decide the case for himself or herself after thoroughly reviewing the evidence and exchanging views with your fellow jurors.

If you desire any of the exhibits, they will be sent to the jury room upon request.

If you want any of the testimony re-read, or any portion of this charge re-read, that can be done.

I will submit the case to you in complete confidence that you will, in accordance with your oath as jurors, decide this case fairly and impartially and without fear or favor.

Are there any exceptions to the charge?

Mr. Graham: I have no exceptions to the charge, your Honor.

The Court: All right. Any exceptions to the charge, Mr. O'Neill?

Mr. O'Neill: I ask your Honor to charge number 3, sir—no exceptions to the charge.

The Court: No exceptions.

You want me to charge number 3 in your proposed requests to charge.

(After examining) Well, I think I have covered that in my charge, but if there is any doubt I will, of course, instruct the jury that the defendant had the right to assume that the plaintiff would exercise the care of a reasonably prudent man. The defendant would have no duty to warn plaintiff of an obvious and apparent danger. In other words, they had a right to assume that the man would act as a reasonably prudent man himself—that is obviously true.

Mr. O'Neill: That is all, sir.

Mr. Graham: If your Honor please, I respectfully request the Court to charge number 6—I mean number 5, I am sorry.

The Court (after examining): Well, I refuse to charge it in the form submitted here. The doctrine of assumption of risk is a very complicated doctrine which cannot be put into the few words that you have there.

Let me say that a man who is at sea, just because he is doing his job at sea and he knows that there are dangers involved there, does not assume the risk of those dangers.

Mr. Graham: I respectfully request your Honor to charge number 10.

The Court: All right. I have said that if there was contributory negligence on the part of the plaintiff which contributed to his injuries, but that if you find that the defendant was negligent, then the contributory negligence would result in an apportionment of damages, depending upon the proportion of the negligence and the proportion of contributory negligence.

Mr. Graham suggests that I should call your attention to the fact that on contributory negligence the burden of

proof will be on the defendant in proving the contributory negligence—that is correct.

Anything else?

Mr. Graham: I respectfully request your Honor to charge number 11.

The Court: I will not so charge. I have already covered that in my charge.

Mr. Graham: Exception.

I respectfully request your Honor to charge number 13.

The Court: I will not so charge. I have already covered that in my charge.

Mr. Graham: Exception.

The Court: I am not going to restate my charge in the language of either counsel. It simply repeats my charge.

Mr. Graham: I respectfully request your Honor to charge number 22.

The Court: I refuse to charge in the form stated.

Mr. Graham: If your Honor pleases, it is substantially the language of the Court of Appeals.

The Court: I don't care.

Mr. Graham: Exception.

The Court: The courts have said one of the most foolish things for the Court to do is to pick one sentence out of a court's opinion and charge the jury on that. You have to have the whole background.

Mr. Graham: I respectfully ask your Honor to charge number 23.

The Court: I refuse to charge in the form stated.

Mr. Graham: Exception.

The Court: I have covered that adequately in my charge.

Mr. Graham: I respectfully request your Honor to charge number 24.

The Court: I refuse to charge in the form stated.

Mr. Graham: Exception. I respectfully request the Court to charge number 28.

The Court: I decline to so charge.

Mr. Graham: Exception.

The Court: I have already covered it adequately in my charge as to how they consider the separate causes of action.

Mr. Graham: I respectfully ask your Honor to charge number 29.

The Court: Well, if that is not clear from my charge, I will say that, of course, the cause of action for failure to provide medical service is not dependent upon the question of whether there was negligence causing the original injury.

I think I made that very clear in my charge, but if there is any question about that, why, I now repeat that.

Mr. Graham: I respectfully request your Honor to charge numbers 39 and 40—the last two.

The Court: I decline to so charge in the form stated. I don't think it makes any difference at all.

Mr. Graham: Exception.

The Court: I have charged that the plaintiff was entitled to the benefits of the Jones Act, which is this law governing negligence as to seamen.

All right, you may swear the marshals.

Mr. O'Neill: Will your Honor charge number 11?

The Court: Do you want that charged?

Mr. O'Neill: Well, all right, I will withdraw it.

The Court: That is a charge upon which the courts, I found out last night, differ in different circuits, as to whether it is proper or not.

I do not want to raise any question of law on that, but I will give them the charge on that if you want it.

Mr. O'Neill: Yes, I think we should have it—I agree with you.

The Court: This matter has never been passed upon by the Court of Appeals of this Circuit or the United States Supreme Court.

Mr. O'Neill: Yes.

The Court: I have my own feeling upon it but I will give the charge if you want it.

Mr. O'Neill: It may be a question of reversible error. I will withdraw it.

The Court: All right. I am ready to stick my neck out and give that charge any time anybody asks for it. I do not know what will happen if it goes to the higher court.

Mr. O'Neill: Well, I feel this way about it—

The Court: Well, let us not discuss it.

All right, you may swear the marshals.

(Whereupon the deputy marshals were sworn.)

The Court: The jury may retire under the custody of the marshals, and if you want to go to lunch, you just tell the marshals and we will see that you are provided with lunch.

I will be in the court house.

(At 12.20 o'clock P. M. the jury retired.)

(At 4.15 o'clock P. M. the jury returned to the courtroom and the following proceedings took place:)

The Court: I have received a message from the jury which says up to this point they have not been able to agree on a verdict.

Of course, the problem is if we don't get an agreement in the case it simply results in a mistrial, the case has to be tried again, and another jury has to come in and hear it, and there is all the expense, both to the parties and of the Court in hearing the case again.

One of the advantages of our democratic system is to try to talk the thing out between yourselves and try to reach a verdict on something which is in accordance with the consciences and beliefs and judgment of all the members of the jury.

Now, while this case has been a two-day case, there has been a lot of evidence that has come in on it and you may want time to consider it.

I am going to ask you as good citizens to try some more—be ready to talk with an open mind, discuss it, see if you can't work it out and reach some agreement which is an agreement of all of you. It would not be fair to take the time of the Court again and the time of counsel—the witnesses all over again, to try this case again—if there is any reasonable chance of your reaching an agreement on it.

I think you understand the issues. You understand the testimony. I can understand how people sometimes have different conclusions on matters. That is what makes life, I guess, and it is one of the things to do, to try and talk it out, see if you cannot reach a verdict. That is the problem we have. See if you can do it. Nobody has to give up their conviction in the matter.

If after thorough discussion you cannot reach an agreement, why then of course there will be a mistrial and the case will have to be retried before another jury, but if you can, I think you should, and I am going to ask you to go back as good American citizens and try and talk it out and try and reach a verdict.

I will be here as long as you are, and I will be here as long as there is a chance of reaching any agreement.

Will you go back and try again?

The Foreman—Your Honor, who can we ask a few questions?

The Court: Well, if you have any questions about the evidence or about the charge, or anything like that—

The Foreman: Yes, but who would we be able to call in to clear the minds of the two—

The Court: Well, I will tell you what you can do: write out the questions. We cannot send anybody into the

jury room. As soon as we send anybody into the jury room, everything goes wrong then.

(Laughter.)

The Court (continuing): Because nobody can participate in the discussion except the members of the jury; but if you have a question that the jury wants answered, write it out, send it in to me and I will call in the jury again and I will advise you as to the best of my ability.

The Foreman: Would you?

The Court: Yes.

The Foreman: Fine.

The Court: Write out the questions that you have in mind, and if they are proper questions for me to answer, why, I will answer them.

The Foreman: Thank you very much.

(At 4.20 o'clock P. M. the jury again retired.)

(At 4.55 o'clock P. M. the jury returned to the court room and the following proceedings occurred:)

The Court: I have received a note from the jury which reads as follows:

"Your Honor.

Does the fact that it has been stated that the 3rd engineer's job is a *one* man's job give the chief mate the right to refuse the 3rd engineer assistance when plaintiff requested a helper (because of the July 4th holiday calling for overtime pay)"

Now, of course, what you are considering here is an action based upon an alleged claim of negligence. We are not considering a question of, let us say, employee relations or labor relations, or anything like that. The only question in this case on that issue is whether what the defendant did was negligence.

Of course, a defendant operates through its agents, who in this case is the chief engineer. Now, a shipowner through its officers has a duty to a seaman, or any other man on the ship, to exercise reasonable care as to any dangers that might be apprehended. That is the duty of a ship's officer, including the chief officer.

Now, as I said in my charge—in other words, the defendant was under a duty to use reasonable care for the safety of the plaintiff. A breach of that duty would constitute negligence.

Now, if the defendant, through the chief engineer, directed plaintiff to do a job which a reasonable man would consider dangerous to the plaintiff, then of course the defendant will be guilty of negligence.

If, on the other hand, the defendant, through the chief engineer, directed the plaintiff to do a job which was a customary job, which was not the type of thing which reasonably would be expected to cause injury to the plaintiff, then the mere fact that an injury did occur is no proof that the injury was caused by the negligence of the defendant.

In other words, you can put it this way: that the defendant is under a duty to see that a man is not compelled to work without necessary assistance if work without assistance would be dangerous to him. But it is not required to provide assistance if the work without that assistance would not be such that a reasonable man would say was dangerous, if it was done without assistance.

Now, that is a question of not what the chief engineer had a right to do in the sense of labor relations. It is a question of was it negligence on the part of the chief engineer to direct him to do this without assistance? Was it negligence in the sense that a reasonable man would say, "That is a dangerous thing that I have told that man to do."

A ship's officer is required to use reasonable care for the safety of the people working on the ship. There is

no rule that simply because an accident has happened the defendant is liable if it did use reasonable care.

Now the question of fact which you have, therefore, is this: Was it negligence in the sense of not using reasonable care to say to this man, "You go ahead and do that job and we won't provide a helper for you"? Was it unreasonable? Was it negligence for him to do that? That is a question which you, drawn from different walks of life—ordinary, reasonable human beings, must decide as a question of fact. It is not what I can decide as a question of fact. That is a question of fact for you to decide on that issue.

Is there any exception to the charge?

(No response.)

The Court: I take it there is not and the jury may retire.

A Juror: Your Honor, may I call home?

The Court: Yes. If you want to send any message home, you write it out whom you want to be called, give it to the marshal and he will put in a call for you—any of you.

A Juror: Thank you very much.

(At 5 o'clock p.m. the jury again retired.)

(At 5.25 o'clock p.m. the jury returned to the courtroom and the following proceedings occurred:)

The Clerk: Ladies and gentlemen of the jury, will you please answer "Present" when your name is called.

(Roll of the jurors was called.)

The Clerk: Madam Forelady, have you agreed upon a verdict?

The Forelady: We have.

The Clerk: And what is your verdict?

The Forelady: For the defendant, on both counts.

The Court: Anybody want the jury polled?

Mr. Graham: I move that the Court poll the jury, please, on the verdict.

The Court: All right, poll the jury.

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded: You say you find for the defendant on both counts?

(Whereupon each juror answered in the affirmative)

The Court: The jury has been polled.

Any motions?

Plaintiff's Motion to Set Aside Verdict and for New Trial

(Record pages 327-327a)

Mr. Graham: At this time, your Honor, I move to set aside the verdict and judgment upon the verdict and for a new trial upon the ground that the verdict is contrary to the evidence, contrary to the weight of evidence and contrary to the law.

The Court: Your motion is denied. You may have an exception.

I think the verdict was a perfectly proper one that the jury could bring in.

Thank you very much, ladies and gentlemen, and when I say it is perfectly proper, that is a matter for the jury. If they had found any other way I would says theirs is the decision. There was nothing wrong with the decision they brought in.

Thank you very much for the long time and attention. Glad you can get home. Glad I can get home.

Extracts from Plaintiff's Filed Requests to Charge Refused by the Court

(Record pages 352-354)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff respectfully requests the Court to charge the Jury in the case on trial upon the law as follows:

* * *

11. The failure to supply sufficient help for the safe performance of a task assigned to a seaman which results in injury to that seaman constitutes negligence under the Jones Act for which the employer is liable.

* * *

13. If the jury find that the plaintiff, in replacing the cylinder head of the generator, was doing the work of more than one man and that this effort proximately resulted in his injury of July 4, 1951, they must return a verdict for plaintiff upon the first cause of action.

* * *

22. Aggravation of an injury does not mean deterioration of that injury, literally, because with proper care he might have improved and been cured, or the extent of his disability limited.

23. By performing his duties as Third Assistant Engineer from Avonmouth to Churchill, Canada, plaintiff did not assume the risk of aggravation of his injuries nor is he chargeable with contributory negligence therefore because he is still under Articles of indenture to the ship.

24. Even though the jury may find that plaintiff did not protest against performing his duties between Avonmouth and Churchill, Canada, he did not assume the risk of aggravating his condition or prolonging his conscious pain and suffering, nor is he chargeable with contributory negligence therefor.

Judgment

(Record page 360)

DISTRICT COURT OF THE UNITED STATES

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The issues in the above entitled action having been brought on regularly for trial before the Hon. Archie O. Dawson and a jury on April 16, 17 and 18, 1956, and the complaint having been dismissed as to Albatross S.S. Co., Inc., and the jury having rendered a verdict in favor of the defendant, it is

ADJUDGED: That the defendant, Astra Steamship Corporation, have judgment against the plaintiff.

Dated, New York, N. Y., April 19, 1956.

WILLIAM V. CONNELL,
Clerk.

Notice of Appeal

(Seaman's Action)

(Record page 362)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that the plaintiff, George P. Gwinett, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment entered in the Clerk's Office of this Court on April 19, 1956, in favor of the defendant, Astra Steamship Corporation, and against the plaintiff and said plaintiff appeals from each and every part of said judgment.

Dated, New York, N. Y., April 19, 1956.

Yours, etc.,

HARRY D. GRAHAM,
Attorney for Plaintiff,
76 Beaver Street,
New York 5, N. Y.

To:

HAIGHT, DEMING, GARDNER, POOR & HAVENS,
Attorneys for Defendant,
Astra Steamship Corporation,
80 Broad Street,
New York, N. Y.

CLERK, U. S. D. C.—S. D. N. Y.

IN THE

Supreme Court of the United States

October 1956 Term

No. 2621

GEORGE P. GAVINETT,

Petitioner,

v.

ASTRA STEAMSHIP CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HARRY D. GRAHAM,
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of Counsel.

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IN THE

Supreme Court of the United States

October 1956 Term

No.

GEORGE P. GWINETT,

Petitioner,

v.

ASTRA STEAMSHIP CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, an American-merchant seaman and plaintiff-appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled matter.

The Opinions of the Courts Below

There was no opinion by the trial court, United States District Court for the Southern District of New York (Dawson, D.J.), sitting at law, upon the motion to set aside the verdict and grant a new trial. The District Court's charge to the jury is at "A" 6a-27a.

"A"—Refers to Petitioner's Appendix below

The opinion of the United States Court of Appeals for the Second Circuit (Hincks, Stewart and Lumbard, C.J.J., opinion per curiam), is reported in 243 F. 2d 8 and is printed here at page 9.

Jurisdiction

The decision and judgment of the Court of Appeals for the Second Circuit sought to be reviewed was entered on April 12, 1957.

This cause is brought under the Jones Act (46 U. S. C. A. 688) and is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

The jurisdiction of this Court to review by writ of certiorari the judgment complained of is conferred by 28 U. S. C. A. Secs. 1254(1), 2101(c) and 2106.

Questions Presented

1. Where a seaman, under orders of a superior to complete the overhauling of a generator, requested that an assistant be assigned to help him lift and replace its cylinder head, but the superior refused him an assistant and directed him to do it alone, and he sustained serious injuries in lifting the cylinder head alone, and there was evidence, which a request by the jury for instructions indicated the jury believed, that he was refused a helper because the Fourth of July holiday would call for overtime pay, did the question of the superior's negligence depend on whether he "directed plaintiff to do a job which a reasonable man would consider as *dangerous* to the plaintiff" and "would say was *dangerous*, if it was done without assistance" and "would conclude that it was a *dangerous* thing to order or permit" and "which reasonably would be *expected* to cause injury to the plaintiff"?

2. Was it prejudicial error under the circumstances for the Court to *refuse* to charge that (1) the failure to supply

sufficient help for the safe performance of a task assigned to a seaman which results in injury to that seaman constitutes negligence under the Jones Act for which the employer is liable, and (2) that if the jury find that the plaintiff, in replacing the cylinder head of the generator, was doing the work of more than one man and that this effort proximately resulted in his injury of July 4, 1951, they must return a verdict for plaintiff upon the first cause of action?

3. Where a seaman's request for an assistant to help him perform a designated task is denied by his superior, and the seaman sustains serious injuries in endeavoring to perform the task alone, is it a necessary ingredient of negligence under the Jones Act; 46 U. S. Code 688, that the seaman must prove that his superior "was able to reasonably foresee" that harm would befall the seaman by requiring him to perform the task unassisted?

Statutes Involved

"*46 U. S. Code 688. Recovery for injury to or death of seaman.*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *." (Balance not pertinent here.)

Statement of the Case

Plaintiff, a seaman, third assistant engineer on defendant's SS HAROLD T. ANDREWS, sued under the Jones Act for personal injuries consisting of two ruptured discs sustained on July 4, 1951, while attempting under orders

of the chief engineer to replace a heavy steel cylinder head on a generator which he had been required to overhaul.

Upon disassembly, plaintiff had been provided with an assistant to help him remove the cylinder head.

Plaintiff requested that a wiper be assigned to assist him in replacing the cylinder head. This request was refused by the chief engineer, who ordered him to do it alone. Plaintiff's evidence established that such refusal was because work of a helper on the Fourth of July holiday would call for overtime pay. That the jury accepted this as the reason for the refusal is apparent from the following written inquiry submitted to the Court by the jury after considerable deliberation:

> "Your Honor.
>
> Does the fact that it has been stated that the 3rd engineer's job is a *one* man's job give the chief mate the right to refuse the 3rd engineer assistance when plaintiff requested a helper (because of the July 4th holiday calling for overtime pay)" (A. 25a).

The Court did not give the jury a responsive answer to this inquiry. It previously had charged, and now repeated by supplemental charge, instructions that

> "Now, a shipowner through its officers has a duty to a seaman, *or any other man on the ship*, to exercise reasonable care as to any *dangers* that might be apprehended.
>
> * * *
>
> Now, if the defendant, through the chief engineer, directed plaintiff to do a job which a reasonable man *would consider dangerous* to the plaintiff, then of course the defendant will be guilty of negligence.
>
> If, on the other hand, the defendant, through the chief engineer, directed the plaintiff to do a job which was a customary job, which was not the type of thing which reasonably *would be expected to cause injury to the plaintiff*, then the mere fact that an injury did occur is no proof that the injury was caused by the negligence of the defendant.
>
> * * *

Was it negligence in the sense that a reasonably man would say, *That is a dangerous thing that I have told that man to do*" (A. 26a; cf. 10a-11a).

The Court, at defendant's request, charged:

> "The defendant would have no duty to warn plaintiff of an obvious and apparent danger. In other words, they had a right to assume that the man would act as a reasonably prudent man himself—that is obviously true" (A. 20a).

The Court refused (A. 21a) plaintiff's requests to charge:

> "11. The failure to supply sufficient help for the safe performance of a task assigned to a seaman which results in injury to that seaman constitutes negligence under the Jones Act for which the employer is liable.
>
> "13. If the jury find that the plaintiff, in replacing the cylinder head of the generator, was doing the work of more than one man and that this effort proximately resulted in his injury of July 4, 1951, they must return a verdict for plaintiff upon the first cause of action" (A. 29a).

The jury having finally rendered a verdict for defendant, plaintiff appealed. The Court of Appeals affirmed, saying in a *per curiam* opinion:

> "As to this cause of action, we find no error in the charge or in the refusal to charge as requested: The *foreseeability of harm* is still a pertinent test in negligence cases under the Jones Act. *Ferguson v. Moore-McCormack Lines*, 2 Cir., 228 F. 2d 891. In reversing this decision, 352 U. S. 521, the Supreme Court did not reject the pertinence of that test" * * *."

Reasons for Allowance of the Writ

The decision herein is in direct conflict with decisions of this Court and the liberal, protective intent of the Congress for seamen as contained in the Jones Act and the statutes adopted thereby.

The decision herein allows a District Court by its charge, and refusals to charge, to deprive an injured seaman suing under the Jones Act of the right to a determination by the jury of an issue of negligence. The fact that this is done by means of a formulated definition of negligence and reasonable foreseeability does not lessen the limitation imposed on the plaintiff to a right to recover only for intended or wilful wrongs rather than negligence.

In *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, (1957), this Court recently considered and reversed the "reasonable foreseeability" opinion of the Court below, whereby it had set aside a jury verdict and said:

> "It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream."

Here, defendant's chief engineer *knew* and, indeed, *ordered* that plaintiff would lift the cylinder head without the assistance of a helper whom plaintiff had told him he needed.

In *Rogers* v. *Missouri P. R. Co.*, 1957, 352 U. S. 500, this Court said that "this Court is vigilant to exercise its power of review in any case where it appears the litigants have been deprived of that determination" and that "Special and important reasons for the grant of certiorari in these cases is certainly present when lower federal and state courts persistently deprive litigants of this right to a jury determination."

It is to be remembered that this man was a seaman, obliged by law to obey the orders of his superior. He was in no position, as would be a shore employee, to refuse to obey and quit his employment. The most he could do was

protests as he did; and then obey, as he did. The Court, however, instead of submitting the case to the jury with this spirit reflected in his charge, actually limited plaintiff more narrowly than claimants at common law unrelated by employment could properly be limited.

Fifty years ago, Mr. Justice Holmes said in *The Germanic* (1950), 196 U. S. 589, 596:

> "But it is a mistake to say, as the petitioner does, that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent."

If one were liable only when a reasonable man would say, with conscious realization, "That is a dangerous thing that I have told that man to do" (A. 26a), a seaman would be limited to recovery only for realized wrongs—rather than negligence.

CONCLUSION

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted.

HARRY D. GRAHAM,
Attorney for Petitioner,
76 Beaver Street,
New York 5, N. Y.

CHARLES A. ELLIS,
of Counsel.

July 9, 1957.

APPENDIX

(Opinion of United States Court of Appeals, for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 273—October Term, 1956

(Argued March 15, 1957 Decided April 12, 1957.)

Docket No. 24118

GEORGE P. GWINETT,

Plaintiff-Appellant,

v.

ALBATROSS S.S. CO., INC.,

Defendant,

and

ASTRA STEAMSHIP CORPORATION,

Defendant-Appellee.

Before:

HINCKS, STEWART and LUMBARD,

Circuit Judges.

Plaintiff appeals from a judgment of the United States District Court for the Southern District of New York, Dawson, *J.*, based on a jury verdict for the defendant Astra Steamship Corporation in an action brought under the Jones Act, 46 U. S. C. A. § 688, and the general maritime law, claiming damages resulting from personal injuries and the aggravation thereof. As against the defendant Albatross S.S. Co., Inc., the complaint had been dismissed below by consent. *Affirmed.*

HARRY D. GRAHAM, New York, N. Y., *for plaintiff-appellant.*

J. WARD O'NEILL, of Haight, Gardner, Poor & Havens, New York, N. Y. (William P. Kain, Jr., on the brief), *for defendant-appellee, Astro Steamship Corporation.*

PER CURIAM:

The plaintiff was instructed to repair a generator without assistance from others. In so doing he injured himself by lifting a part of the machine which on a prior occasion he had handled without injury. The first cause of action was based on negligence in causing this injury.

The appellant contends that it was erroneous to charge the jury that under the Jones Act negligence should be based on the foreseeability of harm and that it should measure conduct by what a reasonable man would do. Instead, appellant contends, the jury should have been instructed that the work order given by a superior officer to the plaintiff was negligent if it resulted in his injury: he complains of the judge's refusal to charge to that effect.

As to this cause of action, we find no error in the charge or in the refusal to charge as requested. The foreseeability of harm is still a pertinent test in negligence cases under the Jones Act. *Ferguson* v. *Moore-McCormack Lines*, 2 Cir., 228 F. 2d 891. In reversing this decision, 352 U. S. 521, the Supreme Court did not reject the pertinence of that test nor did it overrule its prior decisions in *Buzynski* v. *Luckenbach S.S. Co.*, 277 U. S. 226; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; *Cartes* v. *Baltimore Insular Line*, 287 U. S. 367; and *De Zon* v. *American President Line*, 318 U. S. 660, 671. Our decision in the *Ferguson* case was reversed because it was thought that on the evidence the issue of negligence had properly been left to the jury. Here, the issue was properly submitted to the jury and resulted in a verdict adverse to the plaintiff.

The second cause of action, based on a claim that the defendant negligently caused an aggravation of the plaintiff's injury, was also properly submitted to the jury which

decided, adversely to the plaintiff, all the crucial facts involved. And in view of the abundance of evidence to support the verdict on both counts of negligence, the judge was plainly right in denying the motion to set aside the verdict and for a new trial.

Since the case was properly submitted on the merits, there is no need to consider the effect of the plaintiff's failure to except to the charge as given until after an unfavorable result had been announced. Cf. *Palmer* v. *Hoffman*, 318 U. S. 109; *Tompkins* v. *Chicago, D. & G. Bay Transit Co.*, 2 Cir., 234 F. 2d 253, 259. And certainly the judgment should not be disturbed because the record fails to show that the court did "inform counsel of its proposed action upon the requests prior to their argument to the jury," as directed by F. R. C. P. 51. This is especially so since, so far as the record shows, the plaintiff proceeded with his argument without requesting such information of the court. Cf. *Lerin* v. *Joseph E. Seagram & Sons*, 7 Cir., 158 F. 2d 55, cert. den. 330 U. S. 835. Moreover, there is no showing of any resulting prejudice on this account.

Affirmed.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 262

GEORGE P. GWINETT,

Petitioner,

against

ASTRA STEAMSHIP CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals, Second Circuit

BRIEF OF RESPONDENT, ASTRA STEAMSHIP CORPORATION, IN OPPOSITION

J. WARD O'NEILL,
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WILLIAM P. KAIN, JR.,
On the Brief.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 262

GEORGE P. GWINETT,

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against

ASTRA STEAMSHIP CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals, Second Circuit

BRIEF OF RESPONDENT, ASTRA STEAMSHIP CORPORATION, IN OPPOSITION

Opinions Below

There was no opinion in the District Court. At the close of the trial after the jury returned a verdict for respondent on both causes of action set forth in the complaint, the Trial Judge denied petitioner's motion to set aside the verdict and for a new trial (A. 28a *).

The opinion of the United States Court of Appeals for the Second Circuit is officially reported at 243 F. 2d 8, and is set forth in the Appendix on pages 9 to 11 of the petition. The Court of Appeals' opinion is unofficially reported at 1957 American Maritime Cases 980.

* A. 28a refers to petitioner's appendix below.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Whether the United States Court of Appeals for the Second Circuit was correct in holding that the District Judge properly charged the jury in a suit under the Jones Act that the actions of a ship's officer should be measured by what a reasonable man would do under the circumstances.

2. Whether the United States Court of Appeals was correct in holding that the Trial Judge properly refused to instruct the jury to the effect that a work order given to a subordinate by a ship's officer was negligent if, in carrying out the order, the subordinate was injured.

Statutes Involved

Plaintiff brought the action under the Jones Act 41 Stat. 1007, 46 U. S. C. 688, which incorporates the Federal Employers Liability Act, 35 Stat. 65, 45 U. S. C. 51 *et seq.*

Statement

The statement of the case set forth in the petition outlines only the testimony of petitioner and his witnesses at the trial. The testimony of respondent's witnesses has been passed over as of no importance although it is apparent from the verdict that this was the testimony given credence by the jury.

The generator cylinder head cover, which petitioner claims he was attempting to replace at the time he sus-

tained his injury, was estimated by petitioner to weigh from 50 to 70 lbs., although he did not know its actual weight (A. 1b).* The Chief Engineer estimated that the cover weighed 20 to 25 lbs. (A. 17b). The impression is created in the petition that petitioner was furnished assistance when the generator was disassembled. However, the vessel's Chief Engineer testified that the actual physical work was done by plaintiff without assistance (A. 21b). Petitioner's testimony at the trial that the Chief Engineer ordered him to re-assemble the generator during his morning watch on July 4, 1951, was controverted by his own log book entry which showed that no work was done on the generator during that watch (A. 8b, 9b). Petitioner admitted that he could have required the engine room personnel on his watch to perform any tasks which he might have assigned to them since they were already being paid overtime for the July 4th holiday (A. 9b). Indeed petitioner first reported the injury on July 7, 1957, three days after it allegedly occurred (A. 17b, 18b).

There is no claim that the vessel or her appliances were unseaworthy (A. 21b).

While it is fruitless to speculate upon the jury's reasons for its verdict, it is clear that the jury rejected petitioner's testimony that his back condition resulted from lifting the cylinder head cover. The doctor for petitioner as well as the doctor for respondent testified at the trial that they would expect a man of petitioner's age and build to lift such a cover without incident (A. 13b, 14b, 16b). In fact the doctors were in agreement that petitioner's condition could have been brought about by such simple acts as sneezing, coughing, bending over, twisting, lifting or even by a misstep (A. 12b, 13b, 15b, 16b).

At the trial the jury, after deliberating for several hours, advised the Court that they could not agree upon a

* A. 1b refers to respondent's appendix below.

verdict. The Trial Judge thereupon requested the jury to continue its deliberations in order to, if possible, obviate the necessity for a new trial. Before the jury again retired the following colloquy took place:

> "*The Foreman*: Your Honor, who can we ask a few questions?
>
> *The Court*: Well, if you have any questions about the evidence or about the charge or anything like that—
>
> *The Foreman*: Yes, but who would we be able to call in to clear the minds of the two—
>
> *The Court*: Well, I will tell you what you can do: write out the questions. We cannot send anybody into the juryroom . . ." (A. 24a. 25a.)

The jury then retired and shortly thereafter submitted the question set forth on page 4 of the petition. It is thus apparent that the conclusion drawn by petitioner, that the jury gave credence to his testimony that he was refused assistance because it would necessitate payment for overtime, is completely unwarranted. On the contrary, the record indicates that the question was submitted at the behest of only two of the jurors. There is no logical basis for an assumption that a question intended to clarify an issue for two of the jurors is indicative of a determination by the entire panel. The argument could be advanced with equal validity that the jury found that the job of replacing the cylinder head cover was a "one-man job".

Petitioner argues that the Trial Judge's answer to the jury's question was not responsive. Respondent disagrees. The Trial Judge correctly instructed the jury, after considering the question, without objection from petitioner's counsel, that it was not a question of what the Chief Engineer had a right to do in the sense of labor relations, but rather a question of whether it was negligence on the part of the Chief Engineer to direct petitioner to do the work without assistance. The Court further instructed the jury:

> "Now the question of fact which you have, therefore, is this: Was it negligence in the sense of not using reasonable care to say to this man, 'You go ahead and do that job and we won't provide a helper for you?' Was it negligence for him to do that? That is a question which you—drawn from different walks of life—ordinary, reasonable human beings must decide as a question of fact. It is not what I can decide as a question of fact. That is a question of fact for you to decide on that issue." (A. 27a)

Argument

It was conceded by petitioner on the trial that the vessel was seaworthy (A. 21b). The only obligation that respondent, through its officers, owed to petitioner was reasonable care as to any dangers to him which might be apprehended. The only standard of conduct to which the Chief Engineer was required to conform to avoid being negligent was that of a reasonable man under like circumstances. In the absence of an unseaworthy condition aboard the vessel no liability attached to the shipowner where this standard was met. The standard of care required of the Chief Engineer is the same under both the Jones Act and the General Maritime Law.

The petition presents no substantial question of law and the decision of the Court of Appeals does not conflict with those in other Circuits. Review by this Court is therefore unwarranted

The Decision Below Is Clearly Correct

This Court has repeatedly stated in its opinions that neither the Jones Act nor the Federal Employers Liability Act have established a new definition of negligence. *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 377; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67.

The standard of conduct required of the shipowner and his representatives is that of a reasonable man under similar circumstances. *Tiller v. Atlantic Coast Line R. Co., supra; The Iroquois*, 194 U. S. 240, 243; *Matson Navigation Co. v. Hansen*, 132 F. 2d 487, 488 (9 Cir.); *Roberts v. United Fisheries Vessels Co.*, 141 F. 2d 288, 292 (1 Cir.), Cert. Den. 323 U. S. 753 (1944).

The rule is well established that for an act to be negligent it must be one which in the light of all the surrounding circumstances could have been foreseen by a reasonably prudent man as likely to result in an injury. It is obvious that the exact occurrence or the precise nature of the injury need not be foreseen but only that some injury might result from the act. The necessity for the foreseeability of harm as an essential element of negligence was clearly enunciated in *Manhat v. United States*, 220 F. 2d 143, Cert. Den. 349 U. S. 666. In that case plaintiff and his co-employees were working in a life boat suspended over the ship's side. Plaintiff was injured when the boat in which he was working fell to the pier to which the ship was moored. It was determined at the trial that the accident was caused by the manipulation of the life boat's automatic releasing gear which was in good condition at the time. The Court in discussing plaintiff's contention that the shipowner was negligent in failing to take additional precautions to secure the life boat said, at page 147:

> "The preponderance of evidence adduced at the trial fully supports the Trial Court's determination that the prospect of the falling of a life boat under the circumstances presented here did not possess those elements of reasonable foreseeability which would impel the conclusion that reliance upon the Rottmer-type releasing gear constituted a failure to exercise that degree of care which could be expected of a reasonable man."

See, also:

Jacob v. City of New York, 315 U. S. 752, 756;

Here the Trial Judge quite properly and in conformity with recent pronouncements of this Court in *Schulz v. Pennsylvania R. Co.*, 350 U. S. 523, and *Ferguson v. Moore-McCormack Lines*, 352 U. S. 521 left the determination of the question as to whether the Chief Engineer acted as a reasonably prudent man to the jury.

Although not considered by the Court below because of its holding that the case was properly submitted to the jury on the merits, an additional ground exists for the denial of the petition for writ of certiorari. Petitioner having failed to object to either the Trial Judge's initial or supplemental charges (A. 19a, 27a) is precluded from assigning error to these charges for the first time on appeal. *Palmer v. Hoffman*, 318 U. S. 109, 119.

Petitioner's requests to charge, which were refused by the Trial Judge (p. 5 of Petition); incorrectly state the applicable rule of law. Both requests assume that petitioner requested the Chief Engineer to furnish him with assistance in re-assembling the generator. The requests completely ignore the fact that respondent produced testimony at the trial to controvert petitioner's claim that such a request was made. The giving of these charges to the jury would be tantamount to instructing the jury, that the shipowner was liable for any injuries sustained by the petitioner whether the shipowner was negligent or not and, regardless of whether petitioner had requested any assistance. In effect petitioner contends that consideration of the questions of credibility and negligence should not be left to the jury. This contention is completely untenable since the Jones Act does not impose liability without proof of negligence. *De Zon v. American President Line*, 318 U. S. 660, 671.

There Is No Conflict of Decisions

Petitioner alleges on pages 5 through 7 of his petition that the decision of the Court of Appeals is in direct conflict with decisions of this Court. Petitioner does not claim that the decision conflicts with any decisions of the Courts of Appeal for the various Circuits.

Petitioner insists that the Court of Appeals' decision in this case conflicts with the decision of this Court in *Ferguson v. Moore-McCormack Lines*, 352 U. S. 521. On the contrary, the *Ferguson* case affirms the applicability of foreseeability of harm as a pertinent test. This is evident from a consideration of the opinion, an abbreviated portion of which is set forth on page 6 of the petition. This Court said, at page 523:

> "Respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a pre-eminent role in these Jones Act cases (Jacob v. City of New York, 315 U. S. 752; Schulz v. Pennsylvania R. Co., 350 U. S. 523), could conclude that petitioner had been furnished no safe tool to perform his task. It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream. On this record, fair minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him."

It is apparent that the Court of Appeals was correct in its evaluation of the holding in this case when it said in its per curiam opinion (p. 10 of the Petition):

> "Our decision in the Ferguson case was reversed because it was thought that on the evidence the issue

of negligence had properly been left to the jury. Here, the issue was properly submitted to the jury and resulted in a verdict adverse to the plaintiff."

The case of *Rogers* v. *Missouri P. R. Co.*, 352 U. S. 500, cited at page 6 of the petition, is not in point. The holding in the *Rogers case* is certainly not in conflict with the decision of the Court below. In the *Rogers* case this Court held that a plaintiff in a suit under the Federal Employers Liability Act was entitled to a jury determination of the issues in all but those cases, where fair-minded jurors could not honestly differ as to whether the fault of the employer played any part in the employee's injury, and used the language quoted on page 6 of the petition. As previously stated, the Trial Court in this case properly left the issues to the determination of the jury under a proper charge. Petitioner's statement, on page 6 of the petition, that the Chief Engineer knew and ordered that plaintiff lift the cylinder head without assistance again ignores the testimony of respondent's witnesses, which testimony was accepted by the jury.

Respondent does not dispute the proposition for which *The Germanic*, 196 U. S. 589, is apparently cited on page 7 of the petition. It is only necessary that the actor, in the light of all the surrounding circumstances, be able to see that some injury might reasonably be expected to result from his acts. *Munsey* v. *Webb*, 231 U. S. 150, 156; *Palsgraf* v. *Long Island R.R. Co.*, 248 N. Y. 339. The "reasonable man" standard of conduct is an objective criterion and is not, as indicated in the petition, dependent on the actor's conscious realization of the possibility of harm resulting from his actions.

There Is No Important Question of Federal Law Presented and the Petition Does Not Warrant Review by This Court

The petition presents nothing more than the question of whether the Trial Judge's charge to the jury that, in a suit under the Jones Act, petitioner was only entitled to a recovery for negligence; that it should measure the conduct of respondent's Chief Engineer by what a reasonably prudent man would do in the light of all the surrounding circumstances; that if the Chief Engineer's actions were in conformity with the standard of conduct to be expected of a reasonably prudent man and he could not reasonably foresee that they would result in an injury to the petitioner, then the respondent shipowner would not be liable. Petitioner urges that the Trial Judge was required to, in effect, instruct the jury that if petitioner sustained an injury during the course of his work aboard the vessel he was entitled to recovery against the respondent.

The petition advances no convincing argument for such a radical departure, as petitioner urges, from decisions in this and other Courts and no cases are cited in the petition to substantiate the position taken by him.

Petitioner is in reality re-arguing the issues which were decided adversely to him by the jury at the trial. A reading of the record shows that the jury's verdict was abundantly supported by the evidence at the trial. The Trial Judge's instructions to the jury were not objected to until after a verdict adverse to petitioner had been returned.

CONCLUSION

For the foregoing reasons it is respectfully urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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WILLIAM P. KAIN, JR.,
On the Brief.